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SUSAN LAPSLEY
Director



Date: June 11, 2008

To: Derrick Dale Martin

From: Chapter Two Compliance Unit

Subject: **2008 OAL DETERMINATION NO. 11(S)**
(CTU 08-0124-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5; Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as underground regulations Operation Procedure bulletins #11 (issued June 1, 2007), #34 (issued April 3, 2006, with Addendum issued June 21, 2006), and #40 (issued October 12, 2007) regarding inmate count and movement of Close B male inmates issued by the Soledad Correctional Training Facility

On January 24, 2008, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether provisions in Operation Procedure (OP) bulletins #11, #34, and #40, issued by the Soledad Correctional Training Facility, are underground regulations. You allege that these provisions were not adopted in accordance with the California Administrative Procedure Act (APA). The specific provisions you challenge in OP bulletins #11, #34, and #40 are only those pertaining to inmate count and movement of Close B male inmates, not the entirety of each OP. The following summarizes the OP provisions you challenge:

- (1) Additional Close B inmate custody counts at 1215 and 2000 hours. (OP bulletin #11, page 1.) This challenged provision is supplemented by your factual allegation related to OP bulletin #11 that, although not a written provision, the Soledad Correctional Training Facility conducts lockups of Close B inmates at 1130 hours for custody counts.)
- (2) Housing of Close B inmates in an area separate from the general inmate population. (OP bulletin #34, page 3.)
- (3) Restriction of Close B inmates from working in certain areas where the general inmate population is allowed. (OP bulletin #34, pages 3 and 4.)
- (4) Restriction of Close B inmates on hours and access to the library, yard, and other programs and activities compared to the general inmate population. (OP bulletin #34, page 3 and OP bulletin #40, pages 7, 8, and 10.)

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a

“regulation” as defined in Government Code section 11342.600, which should have been, but was not adopted pursuant to the APA.¹ Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

Generally, a rule that meets the definition of a “regulation” in Government Code section 11342.600² is required to be adopted pursuant to the APA. In some cases, however, the Legislature has chosen to establish exemptions from the requirements of the APA. Penal Code section 5058, subdivision (c) establishes exemptions expressly for the CDCR:

(c) The following are deemed not to be "regulations" as defined in Section 11342.600 of the Government Code:

(1) Rules issued by the director applying solely to a particular prison or other correctional facility....

This exemption is called the “local rule” exemption. It applies only when a rule is established for a single correctional institution.

In *In re Garcia* (67 Cal.App.4th 841, 845), the court discussed the nature of a “local rule” adopted by the warden for the Richard J. Donovan Correctional Facility (Donovan) which dealt with correspondence between inmates at Donovan:

The Donovan inter-institutional correspondence policy applies solely to correspondence entering or leaving Donovan. It applies to Donovan inmates in all instances.

....

The Donovan policy is not a rule of general application. It applies solely to Donovan and, under Penal Code section 5058, subdivision (c)(1), is not subject to APA requirements.

Similarly, the OP bulletins at issue here apply solely to the inmates of the Soledad Correctional Training Facility. Ben Curry, Warden of the Soledad Correctional Training Facility, issued the three OP bulletins. Close B male inmates housed at other institutions are controlled by those other institution’s criteria for inmate count and movement. The OP provisions you challenge are

¹ Such a rule is called an “underground regulation” as defined in California Code of Regulations, title 1, section 250, subsection (a):

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

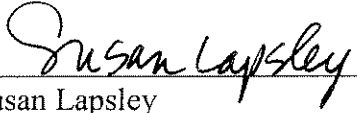
² “Regulation” means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

issued solely by the Soledad Correctional Training Facility. By their own terms, the provisions apply only to inmates at the Soledad Correctional Training Facility. Therefore, the challenged provisions in OP bulletins #11, #34, and #40 are "local rules" and are exempt from compliance with the APA.

For the reasons discussed above, we find that the rules challenged by your petition are not underground regulations.³

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.

Date: June 11, 2008



Susan Lapsley
Director

Richard Smith
Staff Counsel

³ The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

(f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be issued to conclude that a challenged rule is an underground regulation.

(2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:

(A) The challenged rule has been superseded.

(B) The challenged rule is contained in a California statute.

(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.

(D) The challenged rule has expired by its own terms.

(E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule.